Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1145

BUDGET MARKETING, INC.,
JAMES WATSON and
RICHARD PROCHNOW - - - - Appellants

versus

COMMONWEALTH OF KENTUCKY - - Appellee

On Appeal from the Supreme Court of Kentucky

JURISDICTIONAL STATEMENT

ROBERT CHARLES EWALD
ROBERT B. VICE
WYATT, GRAFTON & SLOSS
2800 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

RICHARD L. RICK, P.C.
A Law Corporation
4000 Ingersoll Avenue
Des Moines, Iowa 50312
(515) 255-1143

Counsel for Appellants

January 23, 1980

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

BUDGET MARKETING, INC.,
JAMES WATSON and
RICHARD PROCHNOW - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

JURISDICTIONAL STATEMENT

May it please the Court:

The Appellants, Budget Marketing, Inc., James Watson and Richard Prochnow, appeal from the judgment of the Supreme Court of Kentucky entered on September 11, 1979, rehearing denied October 30, 1979, holding that Ky. Rev. Stat. §§367.510-.540 and .990, the subscription sales statute, as applied in this case, is not repugnant to the Commerce Clause of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is printed in Appellants' Appendix at pages 33-41, and is officially reported at 587 S. W. 2d 245. The opinions of the Court of Appeals of Kentucky and the Oldham Circuit Court are not reported. They appear in the Appendix at pages 22-32 and 20-21 respectively.

JURISDICTION

The judgment of the Supreme Court of Kentucky upholding the constitutionality of the Kentucky subscription sales statute was entered on September 11, 1979. The Supreme Court of Kentucky denied a timely petition for rehearing on October 30, 1979. [Appendix, p. 42]

This appeal is being docketed in this Court within 90 days of the denial of the rehearing below. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(2).

A notice of appeal to this Court was duly filed in the Oldham Circuit Court of Kentucky on January 16, 1980. [Appendix, pp. 43-44]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision here involved is the Commerce Clause to the Constitution of the United States, Article I, Section 8, Clause 3;

> The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes; . . .

The state statute here involved is the subscription sales statute, Ky. Rev. Stat. §§367.510-.540 and .990, found in Volume 13, Part I, pp. 58-59 and 72-73 (1978 Supp.), Official Edition of the Kentucky Revised Statutes and set forth in the Appendix at pages 17-19.

STATEMENT OF QUESTIONS PRESENTED

Whether the Commonwealth of Kentucky places an impermissible burden on interstate commerce by requiring Appellants, under a threat of civil and criminal penalties, to register in as many as 120 counties in Kentucky in order to conduct the business of selling magazine subscriptions by telephone where the means used by Appellants is purely interstate in nature and the Appellants are at no time physically present in the state.

STATEMENT OF THE CASE

A. Statement of Facts

The facts in this case are not complex; they are generally accurate as stated in the opinion of the Supreme Court.

Budget Marketing is an Iowa corporation which does no business in Kentucky, and has no agents or representatives in Kentucky. The only contact Budget

Marketing has with Kentucky is through solicitation of Kentucky residents by interstate telephone calls and by use of interstate mail. [R., pp. 83-86, C31-35, D53-56]

James Watson and Richard Prochnow are the franchisees of Budget Marketing who do business in Memphis, Tennessee, and Atlanta, Georgia. Neither of these Appellants has any representatives or agents in Kentucky. Their only contact with Kentucky is through solicitation by interstate telephone and mail. [R., pp. D51-55]

All three of Appellants are engaged in the interstate solicitation of magazine subscription sales. They use telephone solicitors to call into Kentucky by use of WATS lines to solicit orders for magazine subscriptions. Payment is made by mail and the magazines are delivered by mail. There is no evidence of any nature in the record that any of the Appellants have ever had any physical presence in Kentucky. Affidavits from the Appellants demonstrate that they solicit magazine subscriptions by interstate telephone in virtually every state, and their business in Kentucky is wholly interstate in nature. [R., pp. D51-56]

The subscription sales statute, Ky. Rev. Stat. §§367.510-.540 and .990 [Appendix, pp. 17-19] regulates the sale of printed material. Ky. Rev. Stat. §367.510 defines a solicitor as

> any person engaged in the business of soliciting orders for magazines, periodicals, encyclopedias, books, Bible or other printed matter . . . .

Ky. Rev. Stat. §367.513 requires every solicitor to register annually with the county clerk of the county in which solicitations are to occur.

Ky. Rev. Stat. §367.515 authorizes each county clerk to collect a $5.00 registration fee and requires any person soliciting by telephone in that county to cite the registration number for that particular county to the potential customer being called.

Ky. Rev. Stat. §367.520 provides that any contracts for printed matter shall be "void and unenforceable at the option of the purchaser" if the solicitation was made without the solicitor being properly registered.

Ky. Rev. Stat. §367.990 provides criminal penalties for violation of the registration statute.

B. How the Federal Question Was Presented

This case began with a civil investigation demand issued by the Attorney General in the form of a letter to Budget Marketing in Des Moines, Iowa. [R., p. 26] The nature of this demand was such that it would have required literally truckloads of material to be brought from Des Moines to the office of the Attorney General in Frankfort, Kentucky. [R., pp. C22, D22-25] Budget Marketing advised the Attorney General that it would not comply with the civil investigative demand, and an action was brought in Oldham Circuit Court to enforce that demand. [R., pp. 5-8, 13-15] The suit was challenged on jurisdictional grounds. The complaint was later amended by the Attorney General to include a claim of fraud as the result of the failure of

the Appellants to register pursuant to the subscription sales statute. [R., pp. 9-13, C2-8] In their answer, the Appellants admitted that they had not registered and challenged the constitutionality of the statute as being repugnant to the Commerce Clause. [R., pp. C11-20]

The Oldham Circuit Court granted summary judgment against the Appellants. [Appendix, pp. 20-21] The court held that the subscription sales statute did not violate the Commerce Clause, and further found that the Appellants had violated certain provisions of the Consumer Protection Act in failing to comply with the registration provisions of the subscription sales statute. [R., pp. D92 and 93]

On appeal, the Court of Appeals of Kentucky held in a 2 to 1 decision, Judge Wilhoit dissenting, that the subscription sales statute was constitutional, but that the failure to register in compliance with the subscription sales statute did not necessarily constitute civil fraud in violation of the Consumer Protection Statute. The case was therefore reversed in part and affirmed in part. [Appendix, pp. 22-32]

The Supreme Court affirmed the opinion of the Court of Appeals, expressly ruling that the statute does not burden interstate commerce in violation of the Commerce Clause. [Appendix, pp. 33-41] The Appellants filed a timely petition with the Supreme Court for a rehearing based upon the decisions of this Court regarding state-imposed burdens on interstate commerce. The rehearing was denied. [Appendix, p. 42]

This appeal deals solely with the question of the constitutionality and applicability to these Appellants of the registration provisions of the subscription sales statute. It is a straightforward issue, and in that respect presents an important constitutional question to this Court.

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court of Kentucky Has Decided a Federal Question in a Manner Inconsistent With the Decisions of This Court, the Effect of Which Is to Uphold a State Statute Which Is Repugnant to the Commerce Clause.

Before any out-of-state magazine or book salesperson can telephone a potential customer residing in Kentucky, a Kentucky registration statute requires that salesperson to register with the clerk of the county wherein the customer resides. Before interstate telephone calls of this type can be made throughout Kentucky, the salesperson must register and pay a $5.00 fee in each of Kentucky's 120 counties. The penalty for failing to pre-register in this manner includes criminal penalties as well as civil remedies, even though the telephone caller has never set foot in Kentucky.

In response to Appellants' challenge based upon the Commerce Clause, the Supreme Court of Kentucky held that this registration requirement is constitutionally valid, even though the Appellants' activity is entirely interstate in nature.

A. THE STATUTE HERE IS VOID AND UNENFORCEABLE IN ITS APPLICATION TO THE APPELLANTS BECAUSE IT CONFLICTS WITH THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 8, CLAUSE 3.

> By its terms, the Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States . . ." Long ago it was settled that even in the absence of a congressional exercise of this power, the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce. *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U. S. 429, 440 (1978).

The statute involved in the present case, as it has been interpreted to apply to the Appellants, erects substantial barriers.

1. Soliciting Orders Is Insufficient Activity to Subject the Solicitor to a License or Registration Statement.

Attempts by a state to impose registration requirements or taxes upon persons who do nothing more than solicit orders within that state have been uniformly rejected by the Supreme Court of the United States, beginning with *Robbins* v. *Taxing District of Shelby County, Tennessee,* 120 U. S. 489 (1887), through cases such as *Dahnke-Walker Milling Company* v. *Bondurant,* 257 U. S. 282 (1921), in which this Court reversed a decision of the then Kentucky Court of Appeals which struck down a statute requiring corporate registration before carrying on interstate commerce, to the more recent cases which are discussed herein. In fact, there is no case which we know of, other than the decision of the Supreme Court of Kentucky in this case, which holds that there is a sufficient state interest in mere solicitation to subject a solicitor to the local regulations requiring registration. As this Court has stated:

> It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales. . . . Under the authority of the so called "drummer" cases, such as Robbins v. Shelby County Taxing Dist., Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State. *Eli Lilly & Company* v. *Save-On-Drugs,* 366 U. S. 276, 278-79 (1971).

In the case at bar the Supreme Court of Kentucky has ruled that the Appellants cannot be free from registration requirements in order to make interstate telephone calls from outside the state to promote trade. This proposition is wholly contrary to established law. Even if the Appellants maintain salesmen in Kentucky and there is a physical presence, this would not necessarily allow the Commonwealth to impose such a registration requirement.

> If, for example, a license tax were imposed on the acts of engaging in soliciting orders or making deliveries, conflict of the Commerce Clause would be evident because these are minimal activities within

a State without which there could be no interstate commerce. *Dunbar-Stanley Studios* v. *Alabama,* 393 U. S. 537, 540 (1969).

2. State Registration Statutes Are Generally Not Enforceable Upon Out-of-State Entities Unless There Is Some Type of "Localization" of Activities Sufficient to Authorize a State Requirement of Registration.

We believe Judge Wilhoit's dissent from the majority opinion of the Court of Appeals in this case is correct. Even if the registration required involves very little burden upon the out-of-state corporation, where there is no localization of activities even a minor burden is sufficient to make the registration statute unconstitutional. Typical of this sort of case are the doing business statutes which require registration with a state officer and payment of a fee in order to allow a corporation to do business within that state. As here, the state's interest is argued to be the protection of the local citizens, in order that they may have access to information concerning the nature of the entity they are dealing with and giving them an agent for service of process within the state in the event legal action becomes necessary. These corporate registration statutes involve much less burden than is here involved in a statute which requires registration in all 120 counties.

There are many cases, both state and federal, which strike down such corporate registration statutes, the most recent being *Allenburg Cotton Co., Inc.* v. *Pittman,* 419 U. S. 20 (1974).

The *Allenburg* case was one in which the Mississippi courts refused to enforce an interstate contract made

with a local resident because of a failure of an out-of-state corporation to register to do business in Mississippi. In that case the out-of-state corporation had an arrangement with a local cotton buyer who would make contracts with Mississippi farmers for the delivery of cotton to be produced in the following growing season. Thus, there were more local contacts in that case than in the present. That case was very similar to *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921), a case which involved a Kentucky registration statute. This Court held in *Allenburg* that there must be some elements of localization in order to require registration. The Court emphasized that Allenburg had no office in Mississippi or employees operating there on a regular basis.

> In short, appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business. Whether there were local tax incidents of those contracts which could be reached is a different question on which we express no opinion. Whether the course of dealing will subject appellants to suits in Mississippi is likewise a different question on which we express no view. We hold only that Mississippi's refusal to honor and enforce contracts made for interstate and foreign commerce is repugnant to the Commerce Clause. *Allenburg Cotton Co., Inc.* v. *Pittman,* 419 U. S. 20, 33-34 (1974).

In *Allenburg,* this Court recognized that any analysis of these cases must be careful to avoid confusing

one type with the other. The case we are dealing with here, as in *Allenburg,* is a registration case, requiring registration in a very burdensome fashion before even the solicitation of interstate business is conducted.

B. THERE ARE LESS RESTRICTIVE ALTERNATIVES AVAILABLE.

Rather than require out-of-state businesses to register in each of 120 counties in Kentucky, Kentucky might regulate the terms of contracts which result from the solicitation. *Aldens, Inc.* v. *LaFollette,* 552 F. 2d 745 (7th Cir. 1977) and *Aldens, Inc.* v. *Packel,* 524 F. 2d 38 (3rd Cir. 1975). The information now required to be supplied to the county clerk could be required on the written contract form, thus relieving the customer of the burden of calling the county clerk or going to the clerk's office.

A statute of frauds type statute would also be much more effective than the present registration statute. For example, the state might require that any contract for the subscription sale of printed material be in writing. Thus, even though a telephone solicitation took place, and even though the customer agreed over the telephone to purchase the magazines involved, until that customer actually signed an order or some other form of contract, there would be no enforceable agreement. Kentucky already has a statutory "cooling off period" for certain types of contracts. Ky. Rev. Stat. §367.420. Kentucky could easily provide the type of protection it desires without the unnecessary burden upon interstate commerce which this statute necessarily creates.

C. REGULATION OF INTERSTATE SOLICITATION BY TELEPHONE, THROUGH THE MAILS, OR THROUGH OTHER METHODS IS A MATTER WITHIN THE EXCLUSIVE PROVINCE OF CONGRESS, AND IS NOT SUBJECT TO CONTROL OF THE COMMONWEALTH.

> The commerce clause of the Constitution art. 1, §8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purpose of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. . . .
>
> A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays burden on the exercise of this privilege is void under the commerce clause. *Dahnke-Walker Milling Company* v. *Bondurant,* 257 U. S. 282, 290-91 (1921).

This case demonstrates the necessity for the principle established by the Commerce Clause. It is not argued that the use of long distance lines to make sale solicitations by telephone throughout many areas of the country may not, under some circumstances, require regulation. However, the policy expressed by the Commerce Clause is to promote free communication and

trade across state lines and between the citizens of different states. For example, if each state could require registration in each of its counties as Kentucky is attempting to do, the cumulative burden of such registration would be extremely heavy. If each state passed laws aimed at controlling interstate telephone solicitation, then every state could come up with a different set of rules and regulations. Indeed, there would be nothing to prevent varying local registration ordinances in each county. Such a burden would be intolerable and would involve serious restrictions on interstate commerce. Thus, if there are going to be restrictions on the use of long distance interstate telephone facilities to make solicitations, that restriction should be uniform in its application. This is a matter which only Congress can handle. Such regulatory legislation lies only within the power of Congress to enact. Any regulation by state and local governments must fail as it usurps the power granted to Congress by the Commerce Clause.

CONCLUSION

The issue here involved presents important reasons for noting probable jurisdiction of this appeal. Even though this Court has ruled on this issue in analogous cases, the Supreme Court of Kentucky has rejected the reasoning of those opinions and has specifically upheld the constitutionality of the Kentucky statute against the challenge based upon the Commerce Clause.

For the reasons stated herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ROBERT CHARLES EWALD
ROBERT B. VICE
WYATT, GRAFTON & SLOSS
2800 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

RICHARD L. RICK, P.C.
A Law Corporation
4000 Ingersoll Avenue
Des Moines, Iowa 50312
(515) 255-1143

Counsel for Appellants

January 23, 1980

APPENDIX

TEXT OF KRS 367.510 - 367.540 and KRS 367.990

SUBSCRIPTION SALES OF PRINTED MATERIAL

367.510. "Solicitor" defined.—As used in KRS 367.513 to 367.530 unless the context requires otherwise, "solicitor" means any person engaged in the business of soliciting orders for magazines, periodicals, encyclopedias, books, Bibles, or other printed matter or material on a subscription basis and payable on instalments or on a cash basis or by contract or note, the delivery of which magazines, periodicals, encyclopedias, books, Bibles, or other printed material is contingent upon a future event, such as a down-payment or one or more instalment payments, in any county in this state.

367.513. Registration of solicitor of subscription sales of printed material; Information required. — Beginning July 1, 1974, every solicitor shall register annually with the county clerk of the county in which such solicitations are to occur and shall furnish to the county clerk the following information:

(1) Whether solicitation shall be made in person or by telephone, and if made in person shall give an adequate description, including state of issue and license number, of any motor vehicle to be used in soliciting sales of printed material, or the telephone number from which telephone solicitations shall be made;

(2) His name and social security number;

(3) The mailing address and telephone number of his permanent residence; and

(4) The name, address and telephone number of the company or organization he represents, if any.

367.515. Registration fee; Display of registration receipt; Exceptions.—(1) Upon registration, every solicitor

shall pay the county clerk a five dollar ($5.00) service fee and the county clerk shall issue the solicitor a numbered receipt to be effective for a period of one (1) year from the date of registration.

(2) Prior to actual solicitation, the solicitor shall display to the potential purchaser the registration receipt issued by the county clerk if soliciting in person or cite to the potential purchaser the number of the registration receipt if soliciting by telephone.

(3) The provisions of KRS 367.513 to 367.530 shall not apply to minors soliciting orders for articles mentioned in KRS 367.510 when such sales are made for the sole purpose of obtaining funds for a school band, club or other organization and such sales are approved in writing by the superintendent of the school system at which the minors are students. The written approval of the superintendent shall identify the product or products being sold, the solicitors to be involved and the duration of sales and shall be filed with the county clerk.

367.520. Voidable contracts for sale of printed material.—All orders or contracts for magazines, periodicals, encyclopedias, books, Bibles, or other printed matter or material shall be void and unenforceable at the option of the purchaser if the person or persons soliciting such order or contract is in violation of the provisions of KRS 367.513 and 367.515.

367.530. Permanent registration books maintained.—All county clerks in the Commonwealth shall maintain a book or other similar record on a permanent basis containing the registrations and other information required to be filed under KRS 367.513. Said book shall be a public record.

367.540. Statement of magazine subscription date.—All magazines excluding newspapers mailed into and received in Kentucky shall have included on the label affixed

to the magazine or its mailing wrapper the expiration date of the subscriber's subscription written so as to be understandable to an average subscriber.

PENALTIES

367.990. Penalties.—

* * *

(7) Any solicitor who violates the provisions of KRS 367.513 or 367.515 shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500) or confined in the county jail for not less than one (1) month nor more than six (6) months, or both, for each offense.

OLDHAM CIRCUIT COURT

No. 35-76

COMMONWEALTH OF KENTUCKY, Ex Rel.
Robert F. Stephens, Attorney General - - *Plaintiff*

v.

BUDGET MARKETING, INC., et al. - - - *Defendants*

JUDGMENT AND ORDER

This cause having come before the Court on the Motions of Plaintiff and Defendants for Summary Judgment, and the Court having considered the briefs filed and evidence presented and being fully advised, it is hereby ORDERED AND ADJUDGED:

1. There being no genuine issue of material fact, Defendants' Motion for Summary Judgment is denied, and Plaintiff's Motion for Summary Judgment is sustained.

2. KRS 367.513 and 367.515 are constitutional.

3. Each Defendant is liable for willfully engaging in unfair, false, misleading and deceptive practices in the solicitation and sale of magazine subscriptions in violation of KRS 367.170.

4. Defendants, their agents, employees, assignees and all persons acting in concert or participation with them are enjoined from making any attempt to collect payments from consumers who express either orally or in writing that they wish to cancel their order for magazines or that they do not want to buy magazines from Defendants or who make any expressions of similar intent and effect. Immediately upon receipt of any verbal or written expression from a consumer indicating that he or she does not want to purchase or continue to purchase magazine subscriptions from any or all of the Defendants, Defendants shall cease any further contact of any kind with the consumer.

5. The injunction ordered in paragraph four above, shall remain in full force and effect in every county in the Commonwealth wherein the Defendants have failed to comply with KRS 367.513 and 367.515.

6. Defendants shall register in accordance with KRS 367.513 and 367.515 in every county in Kentucky in which they solicit or sell magazine subscriptions.

7. The Defendants shall jointly be liable and shall pay a total of $2,000.00 into the Treasury of the Commonwealth of Kentucky as a civil penalty for their willful violation of KRS 367.170.

8. That Defendants shall bear the costs of this action.

There being no remaining issues to be heard, this is a final judgment and there is no just reason for delay.

This 1st day of December, 1977.

(s) George F. Williamson
Judge, Oldham Circuit Court

Copies To:
Honorable Rebecca Sitterly, Assistant Attorney General
Honorable Robert Ewald, Attorney for Defendants

OPINION RENDERED: NOVEMBER 10, 1978
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 78-CA-67-MR

BUDGET MARKETING, INC.,
JAMES WATSON, and
RICHARD PROCHNOW - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY, Ex Rel.
Robert A. Stephens, Attorney General - - *Appellee*

Appeal from Oldham Circuit Court
Honorable George F. Williamson, Judge
Civil Action No. 38-76

AFFIRMING IN PART & REVERSING IN PART

BEFORE: WILHOIT, REYNOLDS and HOWERTON, Judges.

REYNOLDS, JUDGE. This is an appeal from a summary judgment and order of Oldham Circuit Court finding appellants, Budget Marketing, Inc., James Watson and Richard Prochnow, in violation of K.R.S. 367.170; assessing a joint civil penalty of $2,000; enjoining appellants from attempts to collect payments from customers who cancelled magazine orders; and upholding the constitutionality of K.R.S. 367.513 and K.R.S. 367.515.

Budget Marketing, Inc., an Iowa corporation engaged in magazine subscription sales, has no office or sales personnel in Kentucky. Its only contact with Kentucky resi-

dents is through interstate telephone (WATS) or mail. Mr. Watson, a resident of Memphis, Tennessee, is a franchisee of Budget Marketing, Inc. and operates Budget Marketing of the South. Richard Prochnow is a resident of Atlanta, Georgia, and is also a franchisee operating as Budget Marketing of Dixie. The business of all appellants in this case is the sale of magazine subscriptions via interstate telephone calls and the transmission of these documents and magazines through interstate carriers, primarily the mail.

After Kentucky residents filed consumer complaints relative to magazine subscription sales and cancellations with the Consumer Protection Division of the Attorney General's office, a preliminary investigation was commenced. A Civil Investigative Demand was thereafter issued, pursuant to K.R.S. 367.240. Appellants questioned the demand and refused to respond. The Commonwealth filed a complaint and an amended complaint which alleged numerous acts and charges. Prior to trial the parties entered an agreed order dismissing all allegations except those that charged that appellants had engaged in unfair, false, misleading and deceptive acts and practices by reason of their solicitation of magazine subscriptions by telephone in counties where they were not registered, pursuant to K.R.S. 367.513 and K.R.S. 367.515, and by reason of their further failure to allow customers to cancel magazine subscriptions as provided in K.R.S. 367.520.

Appellants raise six issues upon this appeal:

(1) Whether appellants are included within the meaning of the word "solicitor" as defined by K.R.S. 367.510;

(2) Whether Kentucky can require appellants, who have no physical presence in this state, to register in each county before carrying on activities which are purely interstate in nature;

(3) Whether summary judgment, including injunctive relief, was improperly granted against appellants;

(4) Whether reasonable efforts to collect a contested indebtedness constitute a violation of K.R.S. 367.170;

(5) Whether the injunction entered was improperly broad and the record provided no basis for many of the prohibitions included; and

(6) Whether judgment against appellants, Budget Marketing, Inc. and James Watson, was improper for lack of venue, as evidence disclosed that only Richard Prochnow had any contact or dealing with residents of Oldham County, Kentucky.

Appellants question whether they are included within the meaning of the word "solicitor" as defined by K.R.S. 367.510. They argue that only if they are deemed to be solicitors can any of the rulings of the circuit court be upheld. K.R.S. 367.510 defines "solicitor" as follows:

> As used in K.R.S. 367.513 to 367.530 unless the context requires otherwise, "solicitor" means any person engaged in the business of soliciting orders for magazines, periodicals, encyclopedias, books, Bibles, or other printed matter or material on a subscription basis and payable on installments or on a cash basis or by contract or note, the delivery of which magazines, periodicals, encyclopedias, books, Bibles, or other printed material is contingent upon a future event, such as a down payment or one or more installment payments, in any county in the state.

This Court finds that appellants are solicitors within the meaning of the statute. This point was tacitly conceded by appellants by their memorandum in support of a summary judgment in which they acknowledged that the definition of "solicitor" in K.R.S. 367.510 "certainly applies to defendants here." In any event, we are mindful of the doctrine that an ambiguous statute must be construed in a manner which preserves its validity. *Folks* v. *Barren*

County, Ky., 232 S.W. 2d 1010 (1950). K.R.S. 367.510, K.R.S. 367.513 and K.R.S. 367.515 are not ambiguous. They clearly apply to the solicitation of printed material orders made either in person or by telephone.

Appellants' second issue raises questions relative to a conflict between the police powers of the Commonwealth of Kentucky and the rights of the appellants to engage in interstate commerce without interference from state regulations. Appellants question whether local registration can be required prior to engaging in magazine subscription sales in the Commonwealth. The statutes in question provide:

> 367.513. Registration of solicitor of subscription sales of printed material—Information required—Beginning July 1, 1974, every solicitor shall register annually with the county court clerk of the county in which such solicitations are to occur and shall furnish to the county court clerk the following information:
>
> (1) Whether solicitations shall be made in person or by telephone, and if made in person shall give an adequate description, including state of issue and license number, of any motor vehicle to be used in soliciting sales of printed material, or the telephone number from which telephone solicitations shall be made;
>
> (2) His name and social security number;
>
> (3) The mailing address and telephone number of his permanent residence; and
>
> (4) The name, address and telephone number of the company or organization he represents, if any.
>
> 367.515. Registration fee—Display of registration receipt. — Exceptions. — (1) Upon registration, every solicitor shall pay the county court clerk a five-dollar service fee and the county court clerk shall issue the

solicitor a numbered receipt to be effective for a period of one (1) year from the date of registration.

(2) Prior to actual solicitation, the solicitor shall display to the potential purchaser the registration receipt issued by the county court clerk if soliciting in person or cite to the potential purchaser the number of the registration receipt if soliciting by telephone.

(3) The provisions of K.R.S. 367.513 to 367.530 shall not apply to minors soliciting order for articles mentioned in K.R.S. 367.510 when such sales are made for the sole purpose of obtaining funds for a school band, club or other organization and such sales are approved in writing by the superintendent of the school system at which the minors are students. The written approval of the superintendent shall identify the product or products being sold, the solicitors to be involved and the duration of sales and shall be filed with the county court clerk.

The Supreme Court in *California* v. *Thompson,* 313 U. S. 109 (1941), reaffirmed the rule that the commerce clause, in conferring upon Congress the power to regulate commerce, did not wholly withdraw from the states their power to regulate matters of local concern with respect to which Congress has not exercised its power even though the state regulation affects interstate commerce. Therefore, in such areas state regulatory statutes may be held valid unless there is an unduly discriminative burden on interstate commerce, or until Congress has acted so as to completely exclude the states. See, also *Kelly* v. *Washington,* 302 U. S. 1 (1937). The statutes in question require simple registration and payment of a minimal fee with the county clerk in any county where the magazine solicitor desires to make either a personal or telephonic solicitation. To solicit magazine subscriptions throughout this state, appellants must register with the county court clerks in 120 different

counties. Appellants maintain that such a requirement, in and of itself, unduly burdens interstate commerce regardless of the local concern involved. We do not agree nor do appellants' authorities clearly support this contention.

Appellants cite *National Bellas Hess* v. *Illinois,* 386 U. S. 753 (1967), as being illustrative of an unduly burdensome restraint on the free flow of interstate commerce. Therein, such a ruling, which stated that the commerce clause prohibits the state from imposing the duty of use tax collection and payment upon a seller whose only connection with the customers in the state is by common carrier and mail, is not applicable to the case at bar. In *Hess, supra,* interstate commerce was being directly taxed or burdened with little or no compelling state interest to justify the action. Tax cases are generically distinguishable from the statute that requires registration with the payment of a minimal fee required to administer the registration. They, of necessity, receive special due process scrutiny when being decided by the courts. See *Aldens, Inc.* v. *Packel,* 524 F. 2d 38 (3rd Cir. 1975). Appellants refer to *Allenberg Cotton Co., Inc.* v. *Pittman,* 419 U. S. 20 (1974), as being a case in which the Supreme Court balanced local contacts against the interest involved in having an out-of-state corporation register within a state. Therein there was "insufficient justification" for a substantial burden placed upon interstate commerce by the state of Mississippi, and we believe *Allenberg, supra,* to be clearly distinguishable. There the Mississippi Supreme Court was refusing to enforce contracts because a corporation was doing business in Mississippi without a certificate. The subject matter of the contracts (cotton) was delivered to a local warehouse temporarily for sorting and classification and was already in the stream of interstate commerce. *Allenberg, supra,* appears as a qualification case rather than a registration case and did not involve a legislative

enactment designed to prevent or reduce fraud in a troublesome area, and in that respect is not dissimilar to *Michigan Wisconsin Pipeline Co.* v. *Commonwealth,* Ky., 474 S. W. 2d 873 (1971), wherein a foreign corporation, which maintained a pipeline for the transportation of natural gas across this state and did not sell or acquire natural gas in this state, was therefore held to be engaged exclusively in interstate commerce. The Court, in *Michigan Wisconsin Pipeline Co., supra,* specifically noted the problems in trying to decide cases in one category by relying upon cases that support the result in a different category. Because the primary function of state government is the protection of its citizens, an exercise of its police power requires less of a nexus than the state's power to tax or regulate interstate commerce. *Aldens, Inc.* v. *LaFollette,* 552 F. 2d 745 (7th Cir. 1977).

The right of a state to regulate interstate transactions in the exercise of its general police power continues to be recognized. It is only undue or discriminatory burdens upon commerce which are forbidden. *Cordell* v. *Commonwealth,* Ky., 254 S. W. 2d 484 (1953). Appellants cite various Kentucky authorities to the effect that Kentucky's precedent as to the matter in question is more stringent than is required by applicable United States Supreme Court cases. See *Cordell, supra; Olin Mills, Inc.* v. *City of Elizabethtown,* Ky., 269 S. W. 2d 201 (1954); *Olin Mills, Inc.* v. *City of Maysville,* Ky., 272 S. W. 2d 460 (1954); *Olin Mills, Inc.* v. *City of Nicholasville,* Ky., 280 S. W. 2d 522 (1955); and *Dunbar-Stanley Studios, Inc.* v. *Alabama,* 393 U. S. 537 (1969). Our analysis of the Kentucky cases demonstrates that an ordinance bearing upon interstate commerce will be held unconstitutional for either of two reasons: (1) if it places an undue burden upon interstate commerce; and (2) if it is discriminatory. In *Cordell, supra,* the license tax of $200 or $10 a day assessed against a mail order photographer but not assessed against locally established businesses was patently discriminatory. In the *Elizabethtown, supra,* case an ordinance imposing a license fee of $20 per year upon all solicitors who solicited in that city from house to house for photographs or for magazine subscriptions was held void to the extent that it applied to persons engaged in interstate commerce. There, however, the court found that the operation of the tax unquestionably affected out-of-state sellers more heavily than local ones and that the license imposed actual discriminatory effects in its practical application even though on its face it purported to treat all persons equally. Further, the Court noted that a municipal license tax not imposed by the legislature for uniform application throughout the state has an obviously greater effect upon interstate commerce than any tax of statewide application which is likely to be laid by the legislature itself.

States may be allowed to deal with local exigencies relative to interstate commerce in some situations. In *Breard* v. *Alexandria,* 341 U. S. 622 (1950), a municipal ordinance forbidding the practice of going in and upon private residences for the purpose of soliciting orders for the sale of goods without the prior consent of the owners or occupants was held not to so burden or impede interstate commerce as to violate the commerce clause of the Federal Constitution. Essentially, the Court acknowledged the principle that when there is a reasonable basis for registration to protect the welfare of a community, the commerce clause cannot be utilized so as to deny the sovereign power of a state to exercise some degree of local control. *Alexandria's* ordinance fell within the classification of regulation. Where a regulation is not an added financial burden upon sales and commerce or an exaction for the privilege of doing interstate commerce so as to be discriminatory, it is a proper exercise of a state's regulatory powers. See also, *Robertson*

v. *California,* 328 U. S. 440 (1945). We do not find that Kentucky's registration statute is excessive for the protection of the local interest affected since it was designed to assure that reasonably responsible and reasonably responsive conduct would govern the sale of printed material in this state. The statute allows Kentucky consumers a means of information whereby they may protect themselves and exercise their legal rights incident thereto. See K.R.S. 367.420. We note from this record that there were numerous complaints regarding sales techniques and tactics utilized in telephone solicitations and that without the registration requirements of K.R.S. 367.513 and K.R.S. 367.515 many persons could become the customers, either willing or unwilling, or even the victims, of a sales program utilizing high-pressure, overreaching, or fraudulent tactics.

We hold that the registration requirements imposed by the Sale Subscription Act do not discriminate between the local and the out-of-state solicitors and that these requirements do not present an undue burden on interstate commerce. A state has the authority to supervise the local aspects of interstate commerce occurring within its borders. See *State* v. *Reader's Digest Association,* 501 P. 2d 290 (Wash. 1972); *Aldens, Inc.* v. *Packel, supra; Aldens, Inc.* v. *LaFollette, supra;* and *Meyers* v. *Matthews,* 71 N. W. 2d 368 (Wisc. 1955). The five-dollar service fee requirement is no more than would be reasonably adequate to cover expenses of administration. *Meyers, supra.* Further, the fear, expressed by appellants, as to the cumulative effect upon interstate commerce of requiring 120 five-dollar service fees to be paid if they desire to solicit subscriptions in all counties of this Commonwealth, is certainly not supported by the record. See *People* v. *Mobin,* 237 Cal. App. 2d 115, 46 Cal. Reptr. 605 (1965). K.R.S. 367.513 and K.R.S. 367.515 represent a justifiable constitutional exercise of the police power of this state.

Upon the third issue, we find that given the facts in this case, and the limited evidence before the court, summary judgment was not proper as to whether appellants had engaged in unfair, false, misleading or deceptive acts or practices in violation of K.R.S. 367.170, since we feel that as to such issue there existed a genuine issue of material fact. KRS Chapter 367 provides no basis wherein the violation of the registration statute is in and of itself a practice declared unlawful by K.R.S. 367.170, and accordingly the joint civil penalty assessed against the appellants pursuant to K.R.S. 367.990(2) was clearly erroneous. We note that the penalty prescribed by K.R.S. 367.990(7) for the violation of the registration statute was not assessed nor is it in issue. Such remaining issues relative to the injunction are moot in that we have held that summary judgment was premature and that appellants must register as solicitors pursuant to K.R.S. 367.513 and K.R.S. 367.515 before attempting to engage in their business in this state. To do otherwise would constitute a violation of K.R.S. 367.990(7) in each county within which they solicit subscriptions.

We find it unnecessary to address the fourth, fifth and sixth issues raised by appellants.

The judgment is affirmed as to the constitutionality of K.R.S. 367.513 and K.R.S. 367.515 and reversed as to that portion finding appellants in violation of K.R.S. 367.170.

Howerton, J., Concurs.

Wilhoit, J., Concurring In Part, Dissenting In Part.

I concur in all of the majority opinion except so much as holds that the registration requirements of K.R.S. 367.513 may be applied to the appellants. Examination of the cases decided by the United States Supreme Court dealing with state taxing or registration statutes leads me to the conclusion that there must be some sort of "localization" of a corporation's activities to authorize a state requirement of registration. Here we have no presence whatsoever

of the appellants within this state. See *Allenberg Cotton Co., Inc.* v. *Pittman,* 419 U. S. 20, 95 S. Ct. 260, 42 L. Ed. 2d 195 (1974); *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944); *National Geographic Society* v. *California Board of Equalization,* 430 U. S. 551, 97 S. Ct. 1386, ____ L. Ed. 2d ____ (1977).

Attorney for Appellants:

ROBERT C. EWALD
2800 Citizens Plaza
Louisville, Ky. 40202

Attorney for Appellee:

RUTH BAXTER
Assistant Attorney General
Consumer Protection Division
209 St. Clair Street
Frankfort, Ky. 40601

ROBERT F. STEPHENS
Attorney General
Capitol Building
Frankfort, Ky. 40601

RENDERED: SEPTEMBER 11, 1979

SUPREME COURT OF KENTUCKY

78 SC 663 DG

BUDGET MARKETING, INC.,
JAMES WATSON,
RICHARD PROCHNOW - - - - - - - *Movants*

v.

COMMONWEALTH OF KENTUCKY, Ex. Rel.,
Robert A. Stephens, Attorney General - *Respondent*

On Review From Court of Appeals
CA No. 78 CA 67 MR
Oldham Circuit Court No. 38-76

OPINION OF THE COURT BY JUSTICE LUKOWSKY—AFFIRMING

The question presented is whether the legislature can constitutionally require nonresidents engaged in the business of soliciting orders, via interstate telephone, for magazines on a subscription basis, the delivery of which is contingent on a future event, to register in each county in the Commonwealth in which they solicit. The trial court and the Court of Appeals answered the question yes. We affirm.

Budget Marketing, Inc. is an Iowa corporation which has no certificate of authority to transact business in this Commonwealth.[1] Watson is the sole proprietor of Budget Marketing of Dixie, located in Memphis, Tennessee, and a franchisee of Budget. Prochnow is the sole proprietor of Budget Marketing of the South, located in Atlanta, Georgia, and a franchisee of Budget. Movants are engaged in the business of soliciting magazines subscription sales through the use of interstate telephone lines. Movants use telephone operators to call into Kentucky communities over some twenty-one wide area telephone service [WATS] lines to solicit orders for magazine subscriptions. When telephone calls result in an order, subscription sales contracts and payments are transmitted back and forth by mail. Thereafter magazines are delivered by mail.

Budget has maintained strict control over its franchisees. It designates territories, manages the subscription service, accepts or rejects each subscription sale contract solicited, and receives a thirty-two per cent commission on sales. We do not find it difficult, therefore, to conclude that the franchisees represent Budget as they engage in the business of subscription sales solicitation in the Commonwealth.

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[1]KRS 271A.520(2) provides in part:

"Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities:

. . . .

(f) Soliciting or procuring orders, whether by mail or through employes or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts; . . ."

The authority of Budget to transact business in this Commonwealth is not questioned. Consequently, Michigan Wisconsin Pipeline Co. v. Commonwealth, Ky., 474 S. W. 2d 873 (1972) is inapposite.

Analysis of the case requires the construction of KRS 367.510-367.515.[2] Movants argue that the statutory provisions are susceptible to such distortion as to allow an

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[2]SUBSCRIPTION SALES OF PRINTED MATERIAL

367.510. "Solicitor" defined.—As used in KRS 367.513 to 367.530 unless the context requires otherwise, "solicitor" means any person engaged in the business of soliciting orders for magazines, periodicals, encyclopedias, books, Bibles, or other printed matter or material on a subscription basis and payable on installments or on a cash basis or by contract or note, the delivery of which magazines, periodicals, encyclopedias, books, Bibles, or other printed material is contingent upon a future event, such as a down payment or one or more instalment payments in any county in this state.

367.513. Registration of solicitor of subscription sales of printed material—Information required.—Beginning July 1, 1974, every solicitor shall register annually with the county clerk of the county in which such solicitations are to occur and shall furnish to the county clerk the following information:

(1) Whether solicitations shall be made in person or by telephone, and if made in person, shall give an adequate description, including state of issue and license number of any motor vehicle to be used in soliciting sales of printed material, or the telephone number from which telephone solicitations shall be made;

(2) His name and social security number;

(3) The mailing address and telephone number of his permanent residence; and

(4) The name, address and telephone number of the company or organization he represents, if any.

367.515. Registration fee—Display of registration receipt—Exceptions.—(1) Upon registration, every solicitor shall pay the county clerk a five dollar ($5.00) service fee and the county clerk shall issue the solicitor a numbered receipt to be effective for a period of one (1) year from the date of registration.

(2) Prior to actual solicitation, the solicitor shall display to the potential purchaser the registration receipt issued by the county clerk if soliciting in person or cite to the potential purchaser the number of the registration receipt if soliciting by telephone.

(3) The provisions of KRS 367.513 to 367.530 shall not apply to minors soliciting orders for articles mentioned in KRS 367.510 when such sales are made for the sole purpose of obtaining funds for a school band, club or other organization and such sales are approved in writing by the superintendent of the school system at which the minors are students. The written approval of the superintendent shall identify the product or products being sold, the solicitors to be involved and the duration of sales and shall be filed with the county clerk.

arbitrary application. It is the duty of this court to "draw all inferences and implications from the act as a whole and thereby, if possible, sustain the validity of the act and expound it." *Folks* v. *Barren County,* 313 Ky. 515, 519-20, 232 S. W. 2d 1010, 1013 (1950).

By its terms KRS 367.513 only applies to "solicitors," a word which the legislature has narrowly defined as "any person *engaged in the business* of soliciting orders . . . in any county in this state." The word "person" may of course include a corporation as well as an individual. KRS 446.010(26) (Supp. 1978); *See Kentucky State Bar Assoc.* v. *Tussey,* Ky., 476 S. W. 2d 177 (1972); KRS 367.110(1). Further, the language does not apply to the physical *activity* of soliciting orders for printed materials. Instead, the statute is couched in terms which apply it to those persons engaged in the *business* of soliciting orders, such as the movants, but not to each telephone operator of the solicitor. The statute would not apply to publishers seeking to sell their own product because they are in the business of publishing not soliciting. On the other hand, a person engaged in the business of solicitation cannot escape the reach of KRS 367.510-367.515 merely because of a collateral business venture.

The statutory definition is further narrowed to apply to such persons soliciting orders for the subject materials "on a subscription basis. . . ." KRS 367.510. The statute looks to a continuing relationship brought about by the solicitation. Individual sales of books, magazines, and the like are not included. This continuing relationship through a subscription is restricted by the language that "the delivery of which magazines . . . is contingent upon a future event, such as a down payment or one or more instalment payments. . . ." KRS 367.510. Therefore, even where a continuing relationship has arisen the "solicitor" appella-

tion will not apply if the printed material is delivered before payment is required or C.O.D.

It is also evident that KRS 367.510 must be read with KRS 367.513 and 367.515. Indeed, both the registration provisions and the definition section were originally parts of the same act of the legislature. 1972 Kentucky Acts, ch. 55. Read together it is clear that the registration plan also extends only to solicitations conducted *in person* or *by telephone.* The statute is directed at face to face or tongue to ear confrontations. The statute does not apply to solicitations through the use of the mails or the advertising media. The statute, by requiring identification of solicitors, is designed to hopefully prevent, or at least insure a meaningful local remedy for the fraud which may result from the pressure inherent in a *conversation* with a hard selling and well-rehearsed salesman.

The statute provides the consumer with a means to determine at the outset whether the solicitor actually is who he claims to be by checking the registration receipt number of the solicitor with the local county clerk. The consumer has available this means of readily checking the credentials of personal solicitors because of the minimal registration requirements of KRS 367.513 and the accompanying requirement of KRS 367.515 that the solicitor identify himself before the solicitation begins by displaying the registration receipt or by reciting over the telephone its number to the target consumer.

The itinerant salesman was with us prior to the Reformation. Ever since there have been continual governmental attempts to protect citizens from the unscrupulous members of this trade.[3] In *Breard* v. *City of Alexandria,* 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), the police

[3] *See Generally* Emert v. Missouri, 156 U. S. 296, 15 S. Ct. 367, 39 L. Ed. 430 (1895) for an overview of the regulation of transient sellers with references to statutes from the time of Henry VIII.

power of the state to prohibit both solicitors and peddlers from plying their trade without the prior invitation of the occupant was upheld with the comment "Unwanted knocks on the door by day or night are a nuisance, or worse, to peace and quiet." The invention of the automatic dialing telephone and the maintenance of telephone service by almost all Americans would permit the expansion of the quoted language to include "unwanted calls on the telephone, by day or by night." It is apparent from the type and number of electronic facilities leased by movants that their telephonic intrusion into each county in which they choose to solicit is systematic, comprehensive and exhaustive.

However, the statute involved here does not attempt to ban uninvited solicitations. It simply seeks to provide easy access to the identity and address of the personal solicitor for the benefit of the consumer. The utility of the Kentucky long arm statute, KRS 454.210 (Supp. 1978), is negated if the consumer who is the potential plaintiff in an action involving the solicitation contract cannot identify or locate the subscription solicitor who knocks on the door or rings the telephone today and then is seen or heard no more. *See Murphy* v. *Erwin-Wasey, Inc.*, C.A. 1st, 460 F. 2d 661 (1972).

The burden imposed by the statute is light. The solicitor need only annually supply his name, social security number, his mailing address, telephone number and identity of any organization he may represent. If he uses an automobile to solicit, he must identify it. If he uses a telephone, he is to give its number. There are no onerous or forbidding qualifications imposed on the solicitor. The solicitor need not share the cost of maintaining a central registration system which would make such information available statewide. Registration is required only in the counties in which solicitations are to be made.

The importance of local notification by filing has been recognized frequently by the legislature. For example, security interests in consumer goods under article nine of the UCC must be filed in the office of the clerk of the county in which the debtor resides, the place where the property would most likely be found. KRS 355.9-401 (Supp. 1978).

It is certainly clear as well that the $5.00 service fee imposed by KRS 367.515 is not a revenue measure but is only adequate to cover the cost of maintenance of the local notification procedure. *See California* v. *Thompson,* 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1941) where a $1.00 license fee for transportation agents was found not to be a revenue measure. It is a sad commentary, but we must note, that the ravages of inflation have made a 1941 dollar at least the equivalent of five 1979 dollars.

Finally, it is obvious that this statute applies to both resident and nonresident solicitors. The statute's scope is measured only by the number of counties in which any solicitor wishes to engage in his business. He need only register in the counties which comprise the territory in which he intends to solicit. The clerical and financial impact of the required registration bears a rational relationship to the breadth of the business conducted. Consequently, this statute does not discriminate against nonresidents. *See California* v. *Thompson, supra.*

Movants argue that the statute requiring registration of solicitors violates the commerce clause of the federal constitution. In view of the foregoing construction of this statute we find no violation.

The United States Supreme Court recently restated the guiding principles to be followed where a state's regulatory interest touches interstate commerce:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been

variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities."

Raymond Motor Transportation, Inc. v. *Rice,* 434 U. S. 429, 441-42, 98 S. Ct. 787, 794, 54 L. Ed. 2d 664, 675 (1978) (quoting Pike v. Bruce Church, Inc., 397 U. S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174, 178) (1970) (citations omitted).

The statute here is a valid exercise of the police power of the Commonwealth in the protection of its citizens which "does not infringe the national interest in maintaining the free flow of commerce and in preserving uniformity in the regulation of the commerce in matters of national concern." *California* v. *Thompson, supra,* at 116, 61 S. Ct. at 934, 85 L. Ed. at 1223.[4] Budget Marketing, Inc. and its franchisees, James Watson and Richard Prochnow, are solicitors within the meaning of KRS 367.510. Each must comply with KRS 367.513 and 367.515 in each county in which he chooses to solicit.

The decision of the Court of Appeals is affirmed, the judgment of the circuit court is affirmed in part and reversed in part and the case is remanded to the circuit court

[4]The Kentucky cases cited by movants involving attempts at regulation and taxation by municipalities are inapposite. *See, e.g.,* Olan Mills v. City of Elizabethtown, Ky., 269 S. W. 2d 201 (1954).

for further proceedings consistent with the opinion of the Court of Appeals.

All concur.

Attorney for Movants:

ROBERT C. EWALD
WYATT, GRAFTON & SLOSS
2800 Citizens Plaza
Louisville, Kentucky 40202

Attorney for Respondent:

ROBERT F. STEPHENS
Attorney General, By

RUTH H. BAXTER
Assistant Attorney General
Consumer Protection Litigation Unit
209 St. Clair Street
Frankfort, Kentucky 40601

OPINION RENDERED: SEPTEMBER 11, 1979

SUPREME COURT OF KENTUCKY

BUDGET MARKETING, INC.,
JAMES WATSON, and
RICHARD PROCHNOW

v.

COMMONWEALTH OF KENTUCKY,
Ex Rel. Robert F. Stephens,
Attorney

File No. 78-SC-663-DG

Appeal From Oldham Circuit Court
Circuit Court Action No. 38-76

MANDATE

The Court being sufficiently advised, and this Court's opinion having been rendered September 11, 1979, it is therefore considered that the decision of the Court of Appeals is affirmed, the judgment of the circuit court is affirmed in part and reversed in part and the case is remanded to the circuit court for further proceedings consistent with the opinion of the Court of Appeals, which is ordered to be certified to said court.

October 30, 1979 Movant's Petition for Rehearing denied.

A Copy - Attest:

(SEAL)

Issued: October 30, 1979

(s) Martha Layne Collins, Clerk

OLDHAM CIRCUIT COURT

No. 35-76

COMMONWEALTH OF KENTUCKY, Ex Rel.
Robert F. Stephens, Attorney General - *Plaintiff*

v.

BUDGET MARKETING, INC.,
JAMES WATSON,
RICHARD PROCHNOW - - - - - *Defendants*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Budget Marketing, Inc., James Watson and Richard Prochnow, the defendants above-named hereby appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Kentucky, affirming the judgment of the Court of Appeals, entered on September 11, 1979, rehearing denied October 30, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

(s) Robert C. Ewald
Wyatt, Grafton & Sloss
2800 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed, first class mail, postage prepaid, this 16th day of January, 1980, to Robert F. Stephens, Attorney General, Capitol Building, Frankfort, Kentucky 40601 and to Ruth Baxter, Assistant Attorney General, Consumer Protection Division, 209 St. Clair Street, Frankfort, Kentucky 40601, counsel for plaintiff.

(s) ROBERT C. EWALD

Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR. CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1145

BUDGET MARKETING, INC.,
JAMES WATSON and
RICHARD PROCHNOW - - - - Appellants

versus

COMMONWEALTH OF KENTUCKY, ex rel.
ROBERT F. STEPHENS, Attorney General - Appellee

On Appeal from the Supreme Court of Kentucky

MOTION TO DISMISS OR AFFIRM

STEVEN L. BESHEAR
Attorney General

BY: JOHN A. MILLER
Assistant Attorney General
209 St. Clair Street
Frankfort, Kentucky 40601
(502) 564-2200
Counsel for Appellee

March 31, 1980

Commonwealth Printing Co., Inc., Frankfort, Ky. Serv. Copyright, Ky.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1145

BUDGET MARKETING, INC.,
JAMES WATSON and
RICHARD PROCHNOW - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY, ex rel.
ROBERT F. STEPHENS, Attorney General - *Appellee*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Kentucky on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of the validity of certain provisions of the Kentucky "Subscription Sales Act" (Kentucky Revised Statutes 367.510-.540

and 367.990(7); see pages 17 through 19 of Appellants Jurisdictional Statement).

This Act provides that persons soliciting orders for magazines or other periodicals which are conditioned upon advance payment by the purchaser are required to register with the county clerk in each county in which the solicitor intends to engage in solicitations either in person or over the telephone. The Act is designed to protect consumers from fraudulent or deceptive solicitations. Upon registration, the solicitor must pay a $5.00 service fee and in return the clerk must issue to the solicitor a numbered receipt. The solicitor must exhibit the receipt to any potential purchaser or, if soliciting by telephone, the solicitor must recite the receipt number to the potential purchaser. Upon registration, the solicitor must furnish the following information to the county clerk:

1. A description of the type of solicitations intended to be engaged in and a description of any motor vehicles to be used in the course of soliciting sales, or the telephone number from which telephone solicitations will be made;
2. The solicitor's name and social security number;
3. The mailing address and telephone number of his permanent residence;
4. The name, address and telephone number of the company or organization he represents, if any.

The Act further provides that all orders or contracts shall be voidable at the option of the purchaser

if the solicitor fails to comply with the Act. In addition, solicitors who violate the Act are subject to a fine of not more than $500.00 and/or a jail sentence of not more than six months for each offense.

B. The Proceedings Below

The Appellants are engaged in the interstate solicitation of magazine subscription sales. After the effective date of the Kentucky Subscription Sales Act, they engaged in solicitations of potential Kentucky purchasers by telephone in violation of the Act. Suit was brought by the Attorney General in Oldham Circuit Court. There being no genuine issue of material fact, the trial court entered summary judgment in favor of the Plaintiff and, in so doing, upheld the constitutionality of the Subscription Sales Act in the face of Appellants' contention that the Act violated the commerce clause of the Constitution. Subsequently, Appellants have appealed this case to the Court of Appeals of Kentucky and the Supreme Court of Kentucky. In each of those appeals, the constitutionality of the Act has been upheld.

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

In the written opinions of both the Court of Appeals and the Supreme Court of Kentucky in this case (see Appendix to Appellants' Jurisdictional Statement), due and careful consideration was given to this Court's pronouncements upon the propriety of state legislation which touches interstate commerce. In upholding the constitutionality of the Subscription Sales Act, the Kentucky courts were merely following well-established principles enunciated by this Court in the cases of *Kelly* v. *Washington,* 302 U. S. 1 (1937) (State inspection and regulation of tugboats engaged in intrastate and interstate commerce upheld); *Breard* v. *City of Alexandria, La.,* 341 U. S. 622 (1951) (Municipal ordinance prohibiting uninvited door-to-door solicitations upheld); *California* v. *Thompson,* 313 U. S. 109 (1941) (State regulation of transportation brokers upheld); and *Robertson* v. *California,* 328 U. S. 440 (1946) (State regulation of insurance solicitors upheld).

The unsubstantiality of this appeal is exemplified by Appellants' reliance upon cases some of which hold contrary to Appellants' thesis and all of which are plainly distinguishable from the central issue here. Specifically, *Eli Lilly & Company* v. *Save-on-Drugs,* 366 U. S. 276 (1971) and *Dunbar-Stanley Studios* v. *Alabama,* 393 U. S. 537 (1969) were both cases in

which the Court upheld state statutes in the face of a commerce clause challenge. *Robbins* v. *Taxing District of Shelby County, Tennessee,* 120 U. S. 489 (1887) concerned imposition of a *tax* which tended to discriminate against interstate commerce. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921) and *Allenburg Cotton Co., Inc.* v. *Pittman,* 419 U. S. 20 (1974) both involved corporate registration to do business statutes which were applied discriminatorily with insufficient justification to out-of-state corporations to deny them state court relief in otherwise valid contract actions. Similarly, *Raymond Motors Transportation, Inc.* v. *Rice,* 434 U. S. 429 (1978) involved state statutes and regulations that not only discriminated against interstate commerce but which also were shown to have no rational basis. Further, *Raymond* sets out the test for reviewing state statutes affecting interstate commerce, the application of which in the instant case plainly demonstrates the constitutionality of the Kentucky Subscription Sales Act. The Court said:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Raymond Motors Transportation, Inc.* v. *Rice, supra,* 441, 42 (quoting *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142 (1970)).

There is substantial uncontradicted evidence in the record in this case that there is a need to protect Ken-

tucky's consumers from fraudulent and deceptive subscription sales solicitations. Appellants have not contended that the Subscription Sales Act fails to satisfy this need. Further, the Act applies evenhandedly to interstate and intrastate commerce. And, finally, the burden which it imposes upon interstate commerce is clearly incidental and very modest in character.

Appellants contend that when telephone solicitations emanate from across a state line only Congress can act to deter or remedy any fraud which may occur. Such belief is seriously outmoded and downright unreasonable. We do not need or want another federal law accompanied by more federal bureaucracy to enforce it. Conversely, it is not in the public interest that the state be handcuffed in dealing with fast talking, high pressure, long distance telephone solicitors who engage in fraudulent or deceptive practices. The Kentucky Act is a modest effort to give Kentuckians the means of being informed about people who want to do business with them. It gives Kentuckians some redress against those who refuse to provide even very limited information about their businesses. The $5.00 service fee is no more than is necessary to administer the record keeping portion of the Act and is certainly not a revenue measure. The information which must be provided is of the type that every solicitor would have at his fingertips. All of the information required to be given will easily fit on a single typewritten page. Appellants make much of the fact that registration is required in each *county* in which they conduct their systematic solicitation program. However, they fail

to mention that a copy of the *same* single typewritten page could be filed in every county in which they solicit. Plainly, Appellants' uninvited intrusions into the homes of Kentuckians will not be seriously hindered by the Act in question.

In view of the fact that the statute in the instant case imposes only minimal inconvenience and expense upon solicitors while evenhandedly effectuating a legitimate local public interest, there can be no real question that it comports with the requirements of the commerce clause of the Constitution as defined by this Court.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Kentucky.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

BY: JOHN A. MILLER
Assistant Attorney General
209 St. Clair Street
Frankfort, Kentucky 40601
(502) 564-2200
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss or Affirm was served on the Appellants, pursuant to Rule 33, by mailing three true and correct copies thereof to Hon. Robert Charles Ewald, Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202; Hon. Robert B. Vice, Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202; and Richard L. Rick, P.C., A Law Corporation, 4000 Ingersoll Avenue, Des Moines, Iowa 50312, this 1 day of April, 1980.

John A. Miller

Assistant Attorney General